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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 203

H. D. RYAN AND L. G. HOWARD, TRADING AS KEYSTONE TRANSFER COMPANY,

Petitioners,

vs.

THE PENNSYLVANIA PUBLIC UTILITY COMMISSION.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COMMONWEALTH OF PENNSYLVANIA AND BRIEF IN SUPPORT THEREOF.

HAROLD D. SHERTZ,
PAUL F. BARNES,
ROBBIN B. WOLF,
W. DAVIS GRAHAM,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

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Petitioners,

vs.

THE PENNSYLVANIA PUBLIC UTILITY COMMISSION.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners, H. D. Ryan and L. G. Howard, trading as Keystone Transfer Company, respectfully prays that a Writ of Certiorari issue herein to review a certain final decision of the Superior Court of the State of Pennsylvania. The Supreme Court of Pennsylvania, being the highest court of appeal in said State, refused to allow a petition for appeal. The decision of the Superior Court was rendered on January 30, 1941. The order of the Supreme Court of Pennsylvania refusing an appeal to that court was filed March 24, 1941 (R. 504).

Opinions Below.

The Opinion of the Superior Court of Pennsylvania is reported in 143 Pennsylvania Superior Court, Page 517, and 17 Atlantic Report 2nd Series, Page 637, and also appears in the record of the present proceedings (R. 489).

The Opinion filed January 30, 1941, affirms the Final Order entered by the Public Utility Commission of the State of Pennsylvania; the adjudication and the opinion of said commission appear in the record of the present proceedings (R. 448).

Statement of the Case.

Since 1920 the petitioners have been engaged in interstate commerce as a common carrier by motor vehicle. The part of their operations involved in the present case is the transportation of goods between Pittsburgh, Pennsylvania, and Washington, Pennsylvania, and between Pittsburgh, Pennsylvania, and Uniontown, Pennsylvania, all via Wheeling, West Virginia. This represents only a small part of the total freight hauled by petitioners, the greater portion of the freight hauled in the same trucks via Wheeling, West Virginia, being that moving between points in different States.

The motor trucks loaded in Pittsburgh, Pennsylvania, go straight through to Wheeling, West Virginia, without pickup or delivery en route. At Wheeling, West Virginia, all freight consigned to Uniontown, Pennsylvania, Washington, Pennsylvania, and points in Ohio and West Virginia is unloaded onto petitioners' platform, assorted, and reloaded at Wheeling, West Virginia, on other trucks for delivery to those points. The same is true in the reverse direction.

The Pennsylvania Public Utility Commission held that the hauling of goods between points in Pennsylvania via Wheeling, West Virginia, was a subterfuge to avoid the

jurisdiction of the Commission. The Commission thereupon entered a final order to cease and desist and assessed a fine on your petitioners in the sum of Fifteen Hundred ($1,500.00) Dollars. This final order was affirmed by the Superior Court of Pennsylvania.

Your petitioners carry on their motor vehicle operations set forth above, under and by virtue of the Order of the Interstate Commerce Commission, which appears in the record of the present proceedings as Respondent's Exhibit No. L (R. 373). Said order provides *inter alia* for transportation between Pennsylvania points, including the points above mentioned, via Wheeling, West Virginia.

The transportation of goods between Pittsburgh, Pennsylvania, and Uniontown and Washington, Pennsylvania, via Wheeling, West Virginia, is a reasonable and necessary incident to the interstate operations by your petitioners.

Jurisdiction.

The decision of the Superior Court of Pennsylvania was entered January 30, 1941. A petition was filed for leave to appeal to the Supreme Court of Pennsylvania. The Supreme Court of Pennsylvania refused that petition on March 24, 1941 (R. 504). The record is presently in the possession of the Superior Court of Pennsylvania, Eastern District, at Philadelphia, Pennsylvania.

The jurisdiction of this Court is invoked under Section 237 (a) and (b) of the Judicial Code as amended; 28 U. S. C. A. Section 344.

Statutes Involved.

The Public Utility Law of Pennsylvania, Act of May 28, 1937, P. L. 1053, Section 1109, provides as follows:

> "Within thirty days after the entry of any final judgment, order, or decree of the Superior Court, any party

to the record, aggrieved thereby, may appeal therefrom to the Supreme Court, if the jurisdiction of the Superior Court is in issue, or if the case involves the construction or application of the Constitution of the United States or of any statute or treaty of the United States, or if the case involves the construction or application of the Constitution of Pennsylvania, or if the appeal to the Supreme Court be especially allowed by the Superior Court itself, or by any one justice of the Supreme Court. Such appeals shall be taken and prosecuted in the same manner, and with the same effect, as is provided in other cases of appeal from the Superior Court to the Supreme Court."

The other statute involved is the United States Statute known as the Federal Motor Carrier Act 1935, 49 U. S. C. A. 301 *et seq.* This statute gives authority to the Interstate Commerce Commission to regulate transportation of goods by motor vehicle engaged in interstate commerce.

Federal Questions Were Raised.

Your petitioners offered in evidence at the hearing before the Pennsylvania Pubic Utility Commission its Compliance Order from the Interstate Commerce Commission authorizing it to operate in the manner provided in said order.

The manner of petitioners' operations under said order between two points in Pennsylvania via Wheeling, West Virginia, as found by the court, is undisputed, and under the Federal Motor Carrier Act 1935, 49 U. S. C. A. 303, Section 203 (a) (10), such operations are interstate commerce subject to the jurisdiction of the Interstate Commerce Commission. See *Hanley* v. *Kansas City So. Ry. Co.*, 187 U. S. 617 (1903); *United States* v. *Erie R. Co.*, 160 Fed. 352 (1909).

The petition for allowance of an appeal presented to the Supreme Court of Pennsylvania set forth the Federal Statute and the Interstate Commerce Commission's control over petitioners' operations.

Questions Presented.

Where the Superior Court of the State of Pennsylvania enters a final judgment affirming an order of the Public Utility Commission and an appeal is presented to the Supreme Court of the State involving the application and construction of a Federal Statute, may the Supreme Court of Pennsylvania under the act of May 28, 1937, P. L. 1053, section 1109, refuse to hear an appeal presented to it?

Where a motor carrier transporting freight between points in one State through another State over the same routes and in the same trucks as traffic moving between points in different States and all under the authority and jurisdiction of the Interstate Commerce Commission and not in violation of any order of the State Commission, and when the freight between the points in the same State is a reasonable and necessary incident to interstate commerce, may the State declare that the carrier is operating as a subterfuge, and order said carrier to cease, and assess a penalty upon said carrier?

Reasons Relied On for Petition of Writ of Certiorari.

The petitioners were complying with the authority of the order of the Interstate Commerce Commission. That Commission had taken jurisdiction of the petitioners' operations prior to any claim of jurisdiction on the part of the Pennsylvania Public Utility Commission. Therefore, the Pennsylvania Public Utility Commission is interfering with interstate commerce, is depriving petitioners of their rights under the Federal Statute governing motor carriers, is in violation of Article I, Section 8, Clause 3, of the Constitution of the United States, and will deprive the petitioners of the protection of the Fourteenth Amendment to the Constitution of the United States.

Furthermore, petitioners have been denied their right to have the case heard by the Supreme Court of Pennsylvania,

thus violating their rights of procedural due process as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

Conclusion.

Wherefore, your petitioners pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the Superior Court of Pennsylvania, requiring that court to certify the whole record of the case herein to this Court for its review and determination.

H. D. Ryan and
L. G. Howard,
Trading as Keystone Transfer Company,
Harold S. Shertz,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 203

H. D. RYAN AND L. G. HOWARD, TRADING AS KEYSTONE TRANSFER COMPANY,

Petitioners,

vs.

THE PENNSYLVANIA PUBLIC UTILITY COMMISSION.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

The first question presented is the refusal of the Supreme Court of Pennsylvania to entertain an appeal from the final order of the Superior Court affirming the order of the Public Utility Commission.

Petitioners at the hearings before the Public Utility Commission contended that the operations herein involved were interstate in nature and under the exclusive jurisdiction of the Interstate Commerce Commission. Petitioners introduced as their Exhibit L (R. 373) an order of the Interstate Commerce Commission taking jurisdiction and authorizing the operations in question under authority of the Federal Motor Carrier Act (49 U. S. C. A. 301 *et seq.*) The

petitioners in their appeals to the Superior Court and the Supreme Court of the State set forth the Federal Statute and Federal questions involved.

It is therefore submitted that under the Public Utility Law, Act of May 28, 1937, P. L. 1050, section 1109, the Supreme Court by the mandate of the Statute was obliged to hear the appeal to it. However, the Supreme Court of Pennsylvania by its order of March 24, 1941, refused to entertain the appeal. Thus it is contended that the refusal of the court has taken from petitioners a valuable right given it by the mandate of the statute which amounts to a violation of procedural due process guaranteed to every citizen by the Fourteenth Amendment to the Federal Constitution.

The second question presented here is whether a motor carrier operating in interstate commerce as a reasonable and necessary incident to such commerce under authority of the Interstate Commerce Commission may be ordered by a State regulatory body to cease and desist from such operation.

Some time prior to 1935 the advent of the Federal Motor Carrier Act 1935 (49 U. S. C. A. 301 *et seq.*), the petitioners herein began operating from Wheeling, West Virginia to Washington and Uniontown, Pennsylvania and points in the States of West Virginia and Ohio, and in the reverse direction and the transportation of property between such points via Wheeling, West Virginia. With the advent of the Federal Motor Carrier Act petitioners filed an application under the so-called "grandfather" clause of the Federal Motor Carrier Act (49 U. S. C. A. 306 (a)), which provides:

> "Provided, however, that * * * if any such carrier or a predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935 over the route or routes or within the territory for

which application is made and has so operated since that time, * * * the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation and without further proceedings * * * and if such carrier was registered on June 1, 1935 under any code of fair competition requiring registration the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate * * * pending the determination of any such application the continuance of such operation shall be lawful."

The Interstate Commerce Commission, acting upon said application, found by its Order of September 5, 1939 (R. 373) that petitioners were in bona fide operation over the routes described therein including the operations herein involved. Thus, the Interstate Commerce Commission had clearly assumed jurisdiction over the operations complained against. Such jurisdiction having been taken, the State Public Utility Commission had no authority over the operations. The Order of the Pennsylvania Public Utility Commission of September 4, 1940 ordering petitioners to cease and desist and assessing a fine of $1,500.00 was void, and in violation of Article I, Section 8, Clause 3 of the Constitution of the United States.

It is well settled in the law that once the Federal Government has entered the field of interstate commerce it is supreme, and the power of the State to regulate interstate commerce ceases. So here Congress by enacting the Federal Motor Carrier Act of 1935 intended to regulate all commerce by motor vehicle in interstate commerce. Under Section 203(a)(10) of the Act Congress defined interstate commerce to mean:

"* * * commerce between any place in a state and any place in another state or between places in the same state through another state * * *"

Thus, the Federal Government, by entering the field of regulation here involved, has completely ousted the State of any jurisdiction.

See *Chicago R. I. & P. Ry. Co.* v. *Hardwick Farmers Elevator Co.*, 226 U. S. 426 (1913) at page 435:

> "* * * the elementary and long settled doctrine is that there can be no divided authority over interstate commerce and that the regulations of Congress on that subject are supreme. It results, therefore, that in a case where from the particular nature of certain subjects the State may exert authority until Congress acts under the assumption that Congress by inaction has tacitly authorized it to do so, action by Congress destroys the possibility of such assumption, since such action, when exerted, covers the whole field and renders the State impotent to deal with a subject over which it had no inherent but only permissive power."

See also *McNeely and Price Co.* v. *Philadelphia Piers, Inc.*, 329 Pa. 113 (1938); *Sproles* v. *Binford*, 286 U. S. 374 (1932); *South Carolina State Highway Department* v. *Barnwell Brothers, Inc.*, 303 U. S. 177 (1938); *H. P. Welch Co.* v. *New Hampshire*, 59 S. Ct. 438 (1939).

The order of the Interstate Commerce Commission (R. 373) provided, among other rights, the authority to transport general commodities between Pittsburgh, Pennsylvania and Wheeling, West Virginia, between Wheeling, West Virginia and Uniontown, Pennsylvania, and between Pittsburgh, Pennsylvania and Washington, Pennsylvania. The Interstate Commerce Commission for means of convenience have used this type of description in describing the points to be authorized to be served by applicants under the "grandfather" clause. As has been shown, the petitioners were performing this operation prior to the advent of the Act and under the application as filed the above order was issued. It is to be noted that this order was issued Septem-

ber 5, 1939. On April 3, 1940 Division 5 of the Interstate Commerce Commission designated the Motor Carrier Division, adopted special terms, conditions, and limitations to the exercise of privileges granted in certificates of common carriers of property by motor vehicle authorized to transport general commodities over regular routes. See Commerce Clearing House, Federal Carriers' Service 3143. Item 4 of this order is as follows:

> "A certificate authorizing operations over two or more routes which have one or more points in common authorizes operations over all combinations of such routes and between all points thereon over the routes specifically described in the certificate."

The Federal Motor Carrier Act, 49 U. S. C. A. 304 (6) provides that the Commission shall have the power

> "To administer, execute, and enforce all provisions of this part to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration."

Thus it is submitted that any order of the Interstate Commerce Commission promulgated by it and in effect at the time the complaint was instituted against the petitioners herein is entitled to great weight and should be conclusive in the interpretation of the rights of petitioners.

It will be noted that the regulation of the Commission of April 3, 1940, has recently been vacated, but not because of the provision referred to herein, but because of other provisions not pertinent here. However, petitioners' rights are to be determined as of the time of the issuance of its compliance order and/or at the time of the complaint being brought.

Under the authority as granted September 5, 1939, the petitioners filed tariffs with the Interstate Commerce Commission covering these specific operations. They do not

have any tariffs on file with the State commission covering points involved in this proceeding (R. 176, 177). These rates are based on some commodities on a mileage basis, and on other commodities the rates are determined on a grouping basis, specifically naming Pittsburgh, Pennsylvania, in one group and Uniontown, Pennsylvania, as another group (R. 421).

It is again pointed out that the requirement and the acceptance by the Interstate Commerce Commission of its duly filed tariffs, covering the exact points involved herein, conclusively show a taking of jurisdiction by the Federal Government, first by the issuance of its order authorizing the operations, and secondly by requiring and accepting tariffs filed thereunder, which tariffs set up rates which not only bind the carrier, but the entire shipping public, and for any violation therefrom the carrier and the shipper would jointly be criminally liable under the laws of the United States.

The Interstate Commerce Commission in Dixie Freight Lines, Inc., Common Carrier Application, M. C. C. 554, 24 M. C. C. 780, passed upon this question and interpreted a similar compliance order. In its original report at 10 M. C. C. 85, the Commission found that applicant was on June 1, 1935, and continuously since, in *bona fide* operation as a common carrier by motor vehicle of general commodities with certain exceptions, in interstate or foreign commerce between Montgomery, Alabama, and Fort Benning, Georgia, via Opelika, Alabama, and Columbus, Georgia, over Route 4 and also between Montgomery, Alabama, and Atlanta, Georgia, via Opelika, Alabama, over Route 3. The first route was granted due to the "grandfather" clause; the second after a finding of public convenience and necessity. Based upon this authorization, the applicant published a tariff and transported property between Atlanta, Georgia, on the one hand, and Columbus and Fort Benning,

Georgia, on the other, via Opelika, Alabama. The Georgia Public Service Commission filed a petition for reconsideration, clarification, and modification of the order. The proceedings were reopened for oral argument. The Georgia Commission and certain motor carrier intervenors asserted that they did not understand applicant had sought or would be granted authority to transport between Georgia points, via Opelika, over an interstate route composed of the respective segments of Routes 3 and 4. There was no contention that any finding in the prior Order was improper *per se*. It was admitted the record justified the conclusion that applicant should be authorized to continue operation over the four different routes, but it was contended that applicants' operations should be confined to the respective routes with no authority to create this additional route by combining routes. The Georgia Commission stated that motor carriers had authority from it to transport between Atlanta and Fort Benning over a route within Georgia; that the distance from Atlanta to Fort Benning over the intrastate route was 28 miles less than over the interstate route via Opelika; and that applicants' use of the latter route was a subterfuge to evade and defeat intrastate regulation.

The Interstate Commerce Commission concludes at page 783:

> "To comply with interveners' request would be contrary to our general policy relative to extension applications, wherein we customarily describe only the proposed route as extended, and if such route is authorized the motor carrier has a right to transport interstate commerce over it to or from any point on its existing routes. This policy avoids duplication of authority."

Thus it is submitted that it is firmly established that the Federal Government has entered not only the general field

of regulation here but has specifically acted with regard to the very operation involved and has found by its order of September 5, 1939, that petitioners were in *bona fide* operation over the routes involved and authorized the continuance of said operations.

The only recent case decided by your Honorable Court which should be pointed out is *Frank Eichholz* v. *The Public Service Commission of the State of Missouri, et al.*, 306 U. S. 268 (1939). In that case Eichholz prior to the passage of the Federal Motor Carrier Act obtained a permit from the State commission to operate as a freight carrier between points in Missouri and points in other States, exclusively in interstate commerce. He did not seek or obtain an intrastate permit. When the State permit was granted, there was in effect a rule of the State commission that no one operating under an interstate permit should accept transportation of property originating and destined within the State. The State commission revoked the permit for violation of the above rule and found that although he operated between points in the same State via another State, yet such a route was merely as a subterfuge to violate the outstanding permit.

It is thus to be noted that in that case the violation was of a State permit granted to Eichholtz upon the condition that he did not operate intrastate, and such permit was granted prior to the advent of the Federal Motor Carrier Act, and he was not operating under any authority granted by the Federal body, but only under a State permit legally issued to him by the State regulatory body. Of course, in such a case as that the State had the authority to decide if their State law had been violated.

Said the court at page 273:

> "Second. When the Commission revoked the permit, the Interstate Commerce Commission had not acted upon appellant's application under the Federal Motor

Carrier Act and meanwhile the authority of the state body to take appropriate action under the state law to enforce reasonable regulations of traffic upon the state highways had not been superseded."

Thus it is submitted that in this case if the Interstate Commerce Commission had not acted the case would be analogous, but once the Interstate Commerce Commission has acted as here by the granting of an order authorizing the operations involved, the State's power to act is superseded and ousted entirely.

Furthermore, the petitioners in the present case have applied for and obtained authority from the State commission for all of its operation in intrastate commerce. The Pennsylvania State commission does not now have, nor ever has had, authority to issue certificates for interstate operations. Thus the interstate operations of petitioners always have been and are now only under the authority of the Interstate Commerce Commission. Here no order of the State commission is violated.

WHEREFORE petitioners pray that your Honorable Court will issue a writ of certiorari to review the final decision of the Superior Court of Pennsylvania.

Respectfully submitted,

HAROLD S. SHERTZ,
PAUL F. BARNES,
814 Crozer Building,
Philadelphia, Pa.
ROBBIN B. WOLF,
W. DAVIS GRAHAM,
801 Plaza Building,
Pittsburgh, Pa.

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H. G. RYAN and L. G. HOWARD, Trading as KEYSTONE TRANSFER COMPANY,

Petitioners,

vs.

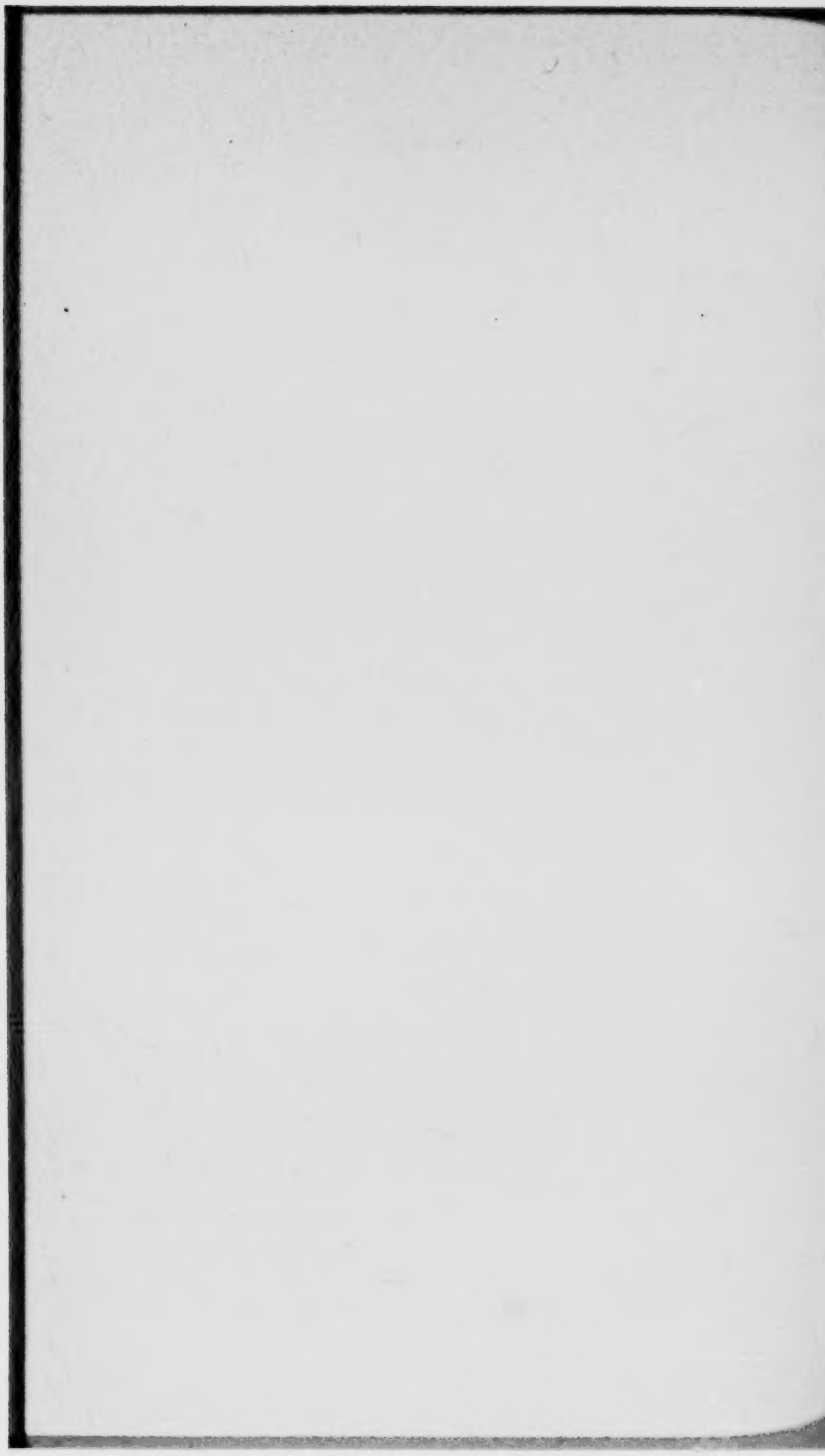
THE PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

CLAUDE T. RENO,
Attorney General of Pennsylvania.
CHARLES E. THOMAS,
PAUL D. LARIMER,
HARRY M. SHOWALTER,
Counsel.

North Office Building,
Harrisburg, Pennsylvania.



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OPINION OF THE COURT BELOW

The opinion of the Superior Court of Pennsylvania may be found in the Record in this case at page 489. It is officially reported in 143 Pa. Superior Ct. 517; 17 Atl. (2nd) 637.

COUNTER-STATEMENT OF THE CASE

In 1920 the petitioner-partnership was formed, with its principal office in Uniontown, Pennsylvania, and began as a common carrier to transport property by motor vehicle. In 1934 the petitioner established a terminal at Wheeling, West Virginia. Between 1933 and 1939 petitioner was granted certain certificates of public convenience by the Pennsylvania Public Utility Commission, to transport named commodities in intrastate commerce by motor vehicle.

On September 5, 1939, the Interstate Commerce Commission, under the provisions of the "Grandfather Clause" of the Federal Motor Carrier Act of 1935 (49 U. S. C. A. 306a), issued to the petitioner a provisional certificate permitting it to operate as a common carrier by motor vehicle in interstate or foreign commerce over certain designated routes between Wheeling, West Virginia, and Pittsburgh, Pennsylvania; between Wheeling, West Virginia, and Uniontown, Pennsylvania, and between certain points in Pennsylvania, including Pittsburgh, over U. S. Highway Route 19, to Washington, Pennsylvania.

All of petitioner's freight, both interstate and intrastate (except those commodities for which it had intrastate certificates, and certain property moving in interstate commerce) originating in Pittsburgh and destined for Uniontown or Washington, Pennsylvania, was shipped by trucks to petitioner's terminal at Wheeling, West Virginia, where it was unloaded and assorted. There the freight shipped from West Virginia and Ohio, as well as that originating in and for delivery in

Pennsylvania, was loaded in another truck and delivered to either Washington or Uniontown.

In transporting goods from Pittsburgh to Washington, Pennsylvania, via Wheeling, petitioner traveled 89 or 90 miles, depending upon which of two routes was traversed, while the direct way, and wholly within Pennsylvania, is a distance of only 29 miles. Also petitioner's trucks in making deliveries to Washington of freight not within one of its intrastate certificates, would go to Washington, continue 30 miles beyond to Wheeling, where the goods were put into another truck and then carried back to Washington. The same plan was followed in making deliveries from Pittsburgh to Uniontown, which by the direct intrastate route is only 52 miles distant from Pittsburgh. In transporting goods via Wheeling the petitioner's trucks traveled either 127 or 128 miles to get to Uniontown,—more than twice as far as the direct intrastate route.

The Pennsylvania Public Utility Commission held that the hauling of goods between points in Pennsylvania, via Wheeling, West Virginia, in the manner described above, was a subterfuge to avoid the jurisdiction of that Commission. The Commission thereupon entered a final order to cease and desist and imposed a penalty upon the petitioner in the sum of $1500. This final order was affirmed by the Superior Court of Pennsylvania (R. 489). The Supreme Court of Pennsylvania refused to allow an appeal from the order of the Superior Court (R. 504).

STATUTES INVOLVED

The following sections and parts thereof, of the Public Utility Law of Pennsylvania, Act of May 28, 1937, Pa. P. L. 1053—

The relevant parts of Section 1101(66 Purdon's Statutes 1431) are as follows:

> "Appeals to Courts; Jurisdiction and Practice. (a) Within thirty days after the service of any order by the Commission, unless an application for a rehearing may be pending, and then within thirty days after the service of the order refusing such application, or the service of an order modifying, amending, rescinding, or affirming the original order, any party to the proceedings affected thereby may appeal therefrom to the Superior Court. Such court is hereby clothed with exclusive jurisdiction throughout the Commonwealth for the purpose of hearing and determining any and all such appeals: * * *
>
> "(b) All appeals to the Superior Court shall be by petition, setting forth specifically and concisely the error or errors assigned to the order of the commission, which petition shall be accompanied by a copy of the order appealed from, and shall also be accompanied by affidavit of the appellant, or of the agent or attorney of such appellant, that the appeal is not taken for the purpose of delay, but because the appellant verily believes that injustice has been done. Each error relied on must

be specified particularly and set forth in a separate numbered paragraph of the petition."

Section 1102 of the Public Utility Law of Pennsylvania, supra, (66 Purdon's Statutes 1432) reads as follows:

"Notice of Appeal; Certification of Record and Costs of Certification.—The commission shall be immediately notified in writing by the appellant of the taking of an appeal, and within a reasonable time after service of such notice, shall certify, under its official seal, to the proper court as hereinbefore provided, the record of such proceedings, which record shall include the evidence taken therein, a copy of all orders made by the commission in such proceedings, and a copy of the opinion, if any, filed by the commission before or after notice of appeal. The cost of preparing and certifying such record shall be paid to the commission by the appellant and taxed as part of the costs in the case to be paid as directed by the court upon the final determination of the appeal."

Section 1107 of the Public Utility Law of Pennsylvania, supra, (66 Purdon's Statutes 1437) reads as follows:

"Record on Appeal; Scope of Inquiry; and Disposition of Costs.—Any appeal to the Superior Court shall be determined upon the record certified by the commission to the court. All evidence in such record so certified may be considered by the court regardless of any technical rule which might

have rendered the same inadmissible, if originally offered in the trial of an action at law. The court may dismiss the appeal, or vacate the order complained of, in whole or in part. In case the order is wholly or partly vacated, the court may also, in its discretion, remand the matter to the commission for such further proceedings, not inconsistent with the decree, as in the opinion of the court justice may require. The order of the Commission shall not be vacated or set aside, either in whole or in part, except for error of law or lack of evidence to support the finding, determination, or order of the commission, or violation of constitutional rights. The costs resulting from any appeal shall be upon the appellant, unless the court shall make other disposition of the costs in its decree.

Section 1109 of the Public Utility Law of Pennsylvania, supra, (66 Purdon's Statutes 1439) reads as follows:

"Appeals to Supreme Court.—Within thirty days after the entry of any final judgment, order, or decree of the Superior Court, any party to the record, aggrieved thereby, may appeal therefrom to the Supreme Court, if the jurisdiction of the Superior Court is in issue, or if the case involves the construction or application of the Constitution of the United States or of any statute or treaty of the United States, or if the case involves the construction or application of the Constitution of Pennsylvania, or if the appeal to the Supreme Court be especially allowed by the Superior Court itself, or by any one justice of the Supreme Court.

> Such appeals shall be taken and prosecuted in the same manner, and with the same effect, as is provided in other cases of appeal from the Superior Court to the Supreme Court."

The Federal Motor Carrier Act (49 U. S. C. A. 301 et seq.) is the only Federal statute involved. The sections of this Statute which are material to our argument are quoted in that portion of our Brief.

QUESTIONS PRESENTED FOR REVIEW.

I. DID THE SUPREME COURT OF PENNSYLVANIA IN REFUSING TO ALLOW AN APPEAL BY THE PETITIONER, VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES?

II. DOES A STATE HAVE THE RIGHT TO DETERMINE WHETHER THE TRANSPORTATION OF FREIGHT BETWEEN POINTS IN THAT STATE THROUGH ANOTHER STATE, OVER AN INDIRECT ROUTE, WHERE THERE IS A MORE DIRECT ROUTE AVAILABLE, IS NOT BONA FIDE INTERSTATE COMMERCE BUT A SUBTERFUGE TO AVOID STATE REGULATION?

ARGUMENT

I. THE SUPREME COURT OF PENNSYLVANIA IN REFUSING TO ALLOW AN APPEAL BY THE PETITIONER, DID NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

There is no merit in the contention of the petitioner that the refusal of the Supreme Court of Pennsylvania to allow an appeal from the Superior Court of that State violated the due process clause of the Fourteenth Amendment of the Federal Constitution. Under the provisions of Section 1101 of the Public Utility Law, supra, the petitioner duly filed its appeal with the Superior Court of Pennsylvania. In that appeal the petitioner was afforded a full opportunity to raise all constitutional and other questions. In passing upon the questions raised by the petitioner the Court had before it the entire record of the Pennsylvania Commission.

The opinion of the Superior Court is reported in 143 Pennsylvania Superior Court, page 517, and in 17 Atlantic Reports (2nd Series) page 637, and also appears in the Record of the present proceeding (R. 489). In its opinion the Superior Court in passing upon the scope of the judicial review required by the Public Utility Law, said (R. 495):

> "We are limited in determining whether there is any error of law or lack of evidence to support

the order of the Commission, or violation of any constitutional right."

The right of appeal to the Superior Court, allowed by the Public Utility Law, plainly satisfies the requirements of the due process clause of the Fourteenth Amendment of the Federal Constitution: **Ohio v. Akron Park District,** 281 U. S. 74-80 (1929). The due process clause thus having been satisfied by a judicial review of the case by the Superior Court, we submit that the **Supreme Court of Pennsylvania in refusing to allow the appeal, did not deprive the petitioner of any constitutional right:** See **Ohio v. Akron Park District,** supra.

If the petitioner has any procedural right to appeal to the Supreme Court of Pennsylvania, it derives that right from Section 1109 of the Public Utility Law, supra. In considering petitions for allowance of an appeal under the provisions of this section the Supreme Court has on different occasions refused to grant the appeal as it did in the instant case (R. 504). This section has been interpreted by the Supreme Court as giving it the power and authority to dispose of the appeal upon the petition. The absence of an opinion by the Supreme Court does not affect the quality of its decision, or detract from its efficacy as a judgment upon the questions presented, and its subsequent conclusive effect upon the rights of the petitioner: **Napa Valley Electric Company vs. Railroad Commission of California,** 251 U. S. 366 (1919).

The petitioner does not question the validity of Section 1109 of the Public Utility Law, supra, but does

question the interpretation placed thereon by the Supreme Court of Pennsylvania in refusing to grant an appeal in this case. **Where a State Law is admitted to be valid, and the only question is whether it has been correctly construed, the Supreme Court of the United States has no jurisdiction: Commercial Bank vs. Buckingham,** 5 Howard 317; **Scott v. Jones,** 5 Howard 343; **Congdon Mining Company v. Goodman,** 2 Black 574.

We, therefore, submit that the petitioner has not been deprived of any right under the due process clause of the Fourteenth Amendment of the Federal Constitution, and that the construction of a State statute, providing for an appeal to the Supreme Court of that State, **does not present a Federal question when the validity of that statute is not questioned: Grand Gulf Railroad & Banking Company v. Marshall,** 12 Howard 165; **Ferry v. King County,** 141 U. S. 668; **Snell vs. Chicago,** 152 U. S. 191.

II. A STATE HAS THE RIGHT TO DETERMINE WHETHER THE TRANSPORTATION OF FREIGHT BETWEEN POINTS IN THAT STATE THROUGH ANOTHER STATE, OVER AN INDIRECT ROUTE, WHERE THERE IS A MORE DIRECT ROUTE AVAILABLE, IS NOT BONA FIDE INTERSTATE COMMERCE BUT A SUBTERFUGE TO AVOID STATE REGULATION.

Petitioner contends that the Commonwealth of Pennsylvania is precluded from determining whether or not

its operations between Pittsburgh and Washington, Pennsylvania, via Wheeling, West Virginia, and between Pittsburgh and Uniontown, Pennsylvania, via Wheeling, West Virginia, is not bona fide interstate commerce but a subterfuge to avoid state regulation. Petitioner in support of its contention relies upon a provisional certificate issued to it by the Interstate Commerce Commission under authority of the Federal Motor Carrier Act (49 U. S. C. A. 301 et seq.) and upon the proposition that the Federal government has occupied this field of interstate commerce by said Act.

We respectfully submit that the contentions of the petitioner are not supported by judicial pronouncements of the courts.

In **Grubb v. Public Utilities Commission of Ohio et al.**, 281 U. S. 470, your Honorable Court held that state and federal courts have concurrent jurisdiction over civil suits arising under the Constitution and laws of the United States, including the Commerce Clause, save in exceptional instances where the jurisdiction has been restricted by Congress to the federal courts. This raises the question of whether or not the Federal Government by the Federal Motor Carrier Act has so occupied the field as to prohibit a state commission or a state court from determining that certain interstate commerce is not bona fide but a subterfuge to avoid state regulation as intrastate commerce.

Prior to the passage of the Federal Motor Carrier Act, it was held in **Inter-City Coach Co. v. Atwood et al.**, 21 Federal (2d) 83 (1927), that to constitute "interstate commerce" by a bus line, it was not suffi-

cient that its busses cross a state line but that they must transport passengers or goods interstate or be intended in good faith to do so. The Court said on page 85:

> "* * * In our opinion, interstate commerce, in order to be entitled to the protection of the federal Constitution, must be real and bona fide. The question whether it is so is open to inquiry.
>
> "Freedom of commercial intercourse between the states, as the Supreme Court has repeatedly held, is of such paramount importance that interference with it by the states cannot be permitted; and the powers of the states have been restricted accordingly. Western Union Tel. Co. vs. Kansas, 216 U. S. 1, 30 S. Ct. 190, 54 L. Ed. 355. **But the commerce thus protected is real commerce. It has never been held, and we believe never intended, that a mere fiction of interstate commerce may be so availed of as to deprive a state of its power to enforce sound regulation of the use of its highways in intrastate commerce.** Interstate Busses v. Holyoke Street R. Co., 273 U. S. 45, 51, 47 S. Ct. 298, 71 L. Ed. 530." (Emphasis ours).

(Appeal refused by Supreme Court, 278 U. S. 663).

The Superior Court of Pennsylvania in passing upon a factual situation identical with the instant case, and similar to the **Inter-City Coach Company v. Atwood,** supra., quoted the above language in **Blackmore et al. v. Public Service Commission,** 120 Pa. Superior Court 437, and said further on page 448:

"* * * As we have indicated the question of subterfuge is one of fact to be determined by the commission, * * *."

We submit that under the law, prior to the passage of the Federal Motor Carrier Act, it was an established principle that a state could determine whether or not a motor carrier was engaged in bona fide interstate transportation or was operating as a subterfuge.

A review of the Federal Motor Carrier Act (49 U. S. C. A. 301 et seq.) does not reveal an intention of Congress to exclude the authority of states to pass upon the question as to whether or not an operation is bona fide interstate commerce or a subterfuge. Section 302 Title 49 U. S. C. A. contains a "Declaration of policy and delegation of jurisdiction to Interstate Commerce Commission." By subdivision (a) of said section, it is the expressed purpose of the Congress to "cooperate with the several states and the duly authorized officials thereof * * * in the administration and enforcement of this chapter." And then by subdivision (c):

> "Nothing in this chapter shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise of each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof. (Feb. 4, 1887, c. 104, Part II, 202, as added Aug. 9, 1935, c. 498, 49 Stat. 543.)"

This section clearly shows that Congress intended to leave with each State the exclusive right to regulate

and control intrastate commerce by motor carriers on the highways of such States. This exclusive right could not be exercised properly if a State had no power to determine that an operation between points in that State, through another State, was not bona fide interstate commerce.

Whatever right the petitioner has to transport goods in interstate commerce, it derives that right from a provisional certificate issued by the Interstate Commerce Commission under the so-called "Grandfather Clause" of the Federal Motor Carrier Act (49 U. S. C. A. 306a), which provides:

> "* * * Provided, however, that * * * if any such carrier or a predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, * * * the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation and without further proceedings * * * and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate * * * pending the determination of any such application the continuance of such operation shall be lawful."

It is clearly to be seen that the "Grandfather Clause" applies only to that transportation which was bona fide

interstate commerce. The petitioner contends that it is protected by this proviso. We submit that this contention is contrary to what was held by your Honorable Court in **McDonald v. Thompson,** 305 U. S. 263 (1938), wherein Mr. Justice Butler said on pages 266-267:

> "Exact definition of 'bona fide operation' is not necessary. As the Act is remedial and to be construed liberally, the proviso defining exemptions is to be read in harmony with the purpose of the measure and held to extend only to carriers plainly within its terms. Piedmont & Northern Ry. Co. v. Interstate Commission, 286 U. S. 299, 311. To limit the meaning to mere physical operation would be to eliminate 'bona fide'. That would be contrary to the rule that all words of a statute are to be taken into account and given effect if that can be done consistently with the plainly disclosed legislative intent. Ginsberg & Sons v. Popkin, 285 U. S. 204, 208. Ex Parte Public National Bank, 278 U. S. 101, 104. There is nothing to justify rejection of these qualifying words. **The expression, 'in bona fide operation, suggests absence of evasion, excludes the idea that mere ability to serve as a common carrier is enough, includes actual rather than potential or simulated service, and in context implies recognition of the power of the State to withhold or condition the use of its highways in the business of transportation for hire. Plainly the proviso does not extend to one operating as a common carrier on public highways of a State in defiance of its laws.**
>
> "As petitioner is not protected in his operation as a common carrier by the proviso, we need not

consider to what extent, if at all, the federal Motor Carrier Act superseded the state Motor Truck Law, or any other question presented by petitioner." (Emphasis ours).

The operations of the petitioner, complained against by the Pennsylvania Commission, were held by the Superior Court of Pennsylvania in its opinion in this case (Record 489), to be in fact intrastate operations for which the petitioner had no certificate and was, therefore, in violation of the laws of the Commonwealth of Pennsylvania.

It is argued that the Pennsylvania Public Utility Commission has no jurisdiction to determine the issue of whether or not petitioner's operations constituted a subterfuge to evade regulation by it, but that the State was precluded from such jurisdiction by the Interstate Commerce Commission issuing a provisional certificate.

It is respectfully submitted that the Pennsylvania Public Utility Commission is not powerless to protect the intrastate commerce of the Commonwealth of Pennsylvania.

The case of **Eichholz v. Public Service Commission of Missouri,** 306 U. S. 268 (1939), is clear authority that a state commission has jurisdiction to determine the question of subterfuge when the Interstate Commerce Commission has not, as yet, finally acted upon the application of the carried filed with it. In that case, Eichholz had held a permit from the Missouri Public Service Commission to operate as a motor carrier over the highways of Missouri between points in Missouri and

points beyond the state exclusively in interstate commerce. He did not hold an intrastate permit. Upon the passage of the Federal Motor Carrier Act he applied for a permit under the "Grandfather Clause" from the Interstate Commerce Commission, and at the time of argument in your Honorable Court his application was still pending.

The Missouri Commission revoked the interstate permit issued by it to Eichholz on the ground that he had unlawfully engaged in intrastate commerce under the pretense of transporting interstate business; that as a subterfuge he had hauled freight originating in St. Louis, Missouri, and destined to Kansas City, Missouri, and vice versa, through his terminal in Kansas City, Kansas, which was located less than one-half mile from the Missouri state line. Eichholz thereupon filed a bill in equity before a three-judge federal statutory court under the provisions of Section 266 of the Judicial Code to enjoin action of the Commission. The District Court dismissed the bill and Eichholz appealed to your Honorable Court.

The then Chief Justice Hughes, speaking for a unanimous court, affirmed the lower court and pointed out that the application of appellant filed with the Interstate Commerce Commission was still pending and at page 274, said:

> "Appellant insists that the hauling from St. Louis over the state line to Kansas City, Kansas, of merchandise consigned to persons in Kansas City, Missouri, and hauling it back again to its intended destination in Kansas City, Missouri, was

> actually interstate transportation. Hanley vs. Kansas City Southern Ry. Co., 187 U. S. 617; Western Union Telegraph Co. v. Speight, 254 U. S. 17; Missouri Pacific R. Co. v. Stroud, 267 U. S. 404. That fact, however, does not require the conclusion that the State's action for the protection of its intrastate commerce was invalid. See Lone Star Gas Co. v. Texas, 304 U. S. 224, 238. We may assume that Congress could regulate interstate transportation of the sort here in question, whatever the motive of those engaging in it. **But in the absence of the exercise of federal authority, and in the light of local exigencies, the State is free to act in order to protect its legitimate interests even though interstate commerce is directly affected.** Cooley v. Board of Wardens, 12 How. 299, 319; Morgan's S. S. Co. v. Louisiana, 118 U. S. 455; Smith v. Alabama, 124 U. S. 465; Kelly v. Washington, 302 U. S. 1, 9, 10. * * * (Emphasis ours).

The present case is exactly similar to the above case. The application of petitioner before the Interstate Commerce Commission has not, as yet, been finally adjudicated. The record in this appeal shows that the Interstate Commerce Commission, on September 5, 1939, issued to appellants a compliance order which grants them provisional authority to operate over the routes described therein (R. 373). **That is not a final adjudication of their application.**

The Superior Court of Pennsylvania, in its opinion in the instant case, recognized the facts in this case to be identical with those in the Eichholz case by saying (R. 495):

> "The Federal Motor Carrier Act of August 9, 1935 (49 U. S. C. A. 302c) expressly recognized the right of the several states to regulate intrastate carriage. The Supreme Court of the United States **in the Eicholtz case, supra, which involved a situation substantially analogous to the present case,** very definitely state that a state Commission has jurisdiction to determine the question whether carrying merchandise across state lines is bona fide or a mere subterfuge to evade the state Commission's jurisdiction. It ruled, p. 273, that mere pendency before the Interstate Commerce Commission of an application by a motor carrier to operate under the Federal Motor Carrier Act in interstate commerce did not supersede the authority of the state body to take appropriate action under the state law to enforce reasonable regulations of traffic on the state highways. * * * *" (Emphasis ours).

Petitioner has argued at pages 10 and 11 of its Brief that the routes traveled by it have been authorized by the Interstate Commerce Commission (Record 373), and that by virtue of a regulation of the Interstate Commerce Commission dated April 3, 1940 (Petitioner's Brief, page 11) it was permitted to combine its routes and render the service here in question. However, the petitioner admits on page 11 of its Brief, that this regulation of the Interstate Commerce Commission, permitting a combination of routes, has been vacated; and it further admits that this regulation has no effect upon its rights, but that those rights are to be determined as of the time of the issuance of its compliance order, and/or at the time of the complaint being brought.

We respectfully submit that there is no provision in the compliance order authorizing transportation between Pittsburgh and Washington, Pennsylvania, via Wheeling, West Virginia, nor between Pittsburgh and Uniontown, Pennsylvania, via Wheeling, West Virginia, nor any right to combine any of the routes described therein.

Section 208a of the Federal Motor Carrier Act (49 U. S. C. A. 308a) states that:

> "Any certificate issued * * * shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which * * * the motor carrier is authorized to operate;"

The compliance order (R. 373) gives the "regular routes, between fixed termini * * * as specified" (R.375). There then appears a list of regular routes and fixed termini, included in which are the routes and the termini mentioned above. The compliance order clearly states that (R. 374) * * * **applicant shall not engage in any motor carrier operation not described herein or otherwise lawfully authorized."** (Emphasis ours).

Thus it is clearly to be seen that the compliance order does not authorize petitioner to render the service in question here, and under all the law and facts in this case, the Commonwealth of Pennsylvania was not precluded from determining that said operations did not constitute bona fide interstate commerce **but were a subterfuge and in violation of the laws of the Commonwealth.**

We have carefully reviewed the cases cited by petitioner in its Brief and respectfully submit that the principles enunciated therein are not controlling or decisive of the issues here in question.

CONCLUSION

Under the law and the facts, we respectfully urge your Honorable Court to deny the prayer of the petition for Writ of Certiorari.

Respectfully submitted,

CLAUDE T. RENO,
Attorney General of Pennsylvania
CHARLES E. THOMAS,
PAUL D. LARIMER,
HARRY M. SHOWALTER,
Counsel for
Pennsylvania Public Utility Commission
North Office Building,
Harrisburg, Pennsylvania

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IN THE

Supreme Court of the United States

October Term, 1941

No. 203

H. D. RYAN AND L. G. HOWARD, TRADING AS KEYSTONE TRANSFER COMPANY,
Petitioners

vs.

THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

HAROLD S. SHERTZ,
PAUL F. BARNES,
814 Crozer Building,
Philadelphia, Pa.,

ROBBIN B. WOLF,
W. DAVIS GRAHAM,
801 Plaza Building,
Pittsburgh, Pa.,
Attorneys for Petitioners.

Murrelle Printing Company, Law Printers, 201-203 Lockhart St., Sayre, Pa.
Joseph M. Mitchell, Philadelphia County Representative, 5738 Thomas Avenue, Philadelphia, Pa.

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IN THE SUPREME COURT OF THE UNITED STATES

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No. 203

H. D. Ryan and L. G. Howard, Trading as Keystone Transfer Company,

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vs.

The Pennsylvania Public Utility Commission

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

ARGUMENT

The brief of respondent, as did the opinion of the Superior Court of Pennsylvania, the subject of this petition, so vitally misconstrued the authority granted by the Interstate Commerce Commission in its order of April 3, 1940, prior to the attempted assumption of jurisdiction by the Pennsylvania Public Utility Commission that this reply is deemed justified.

This is made clear by the conclusions in Respondent's Brief, page 21, as follows:

> "We respectfully submit that there is no provision in the compliance order authorizing transporta-

tion between Pittsburgh and Washington, Pennsylvania, via Wheeling, West Virginia, nor between Pittsburgh and Uniontown, Pennsylvania, via Wheeling, West Virginia, nor any right to combine any of the routes described therein."

"Thus it is clearly to be seen that the compliance order does not authorize petitioner to render the service in question here, and under all the law and facts in this case, the Commonwealth of Pennsylvania was not precluded from determining that said operations did not constitute bona fide, interstate commerce *but were a subterfuge and in violation of the laws of the Commonwealth.*"

And further to the interpretation placed by the Respondents upon the decision of your Honorable Court in *Eichholz versus Public Service Commission of Missouri*, 306 U. S. 268 (1939) at page 17 of their brief where Respondents state the above case to be authority:

"That a state commission has jurisdiction to determine the question of subterfuge when the Interstate Commerce Commission has not, as yet, finally acted upon the application of the carrier filed with it."

The order referred to above is that issued by the Interstate Commerce Commission, Division 5 (designated the Motor Carrier Division), September 5, 1939 (Record, pages 373a-375a).

The order is shown to be issued upon the application of petitioners. The testimony of record shows the application to have been filed under the "grandfather" clause of the Federal Motor Carrier Act, Section 206 (a) (49 U. S. C. A. 306 (a)) (Record, page 247a).

The order of the Interstate Commerce Commission authorizing the operations herein complained of provided among other things as follows (Record, page 373a):

"It further appearing, that applicant or predecessor in interest was, on June 1, 1935, and continuously since has been in bona fide operation as a common carrier by motor vehicle in interstate or foreign commerce according to the specifications *set forth as appended on the reverse side hereof or attached hereto* and made a part of this order; and the Commission so finding, * * *" (Italics supplied)

The order further states (Record, page 374a), that upon compliance with named sections of the Motor Carrier Act and the rules and regulations prescribed by the Commission thereunder governing filing of common carrier rate publications and filing of evidence of security for protection of the public and so forth, a certificate of public convenience and necessity shall be issued unless otherwise ordered, authorizing the applicant to engage in interstate or foreign commerce, as a common carrier by motor vehicle according to the specifications set forth as appended on the reverse side of the order.

The Petitioners complied with these Sections of the Act and these rules and regulations (Record, page 247a).

Among the specified routes in the appendix (Record, pages 376a-378a) appear the following:

"Between Wheeling, West Virginia, and Pennsylvania points as follows:"

"From Wheeling over West Virginia Highway 2 to Weirton, West Virginia thence over U. S. Highway 22 to Pittsburgh, Pennsylvania, thence over Pennsylvania Highway 88 to Rochester, Pennsylvania, and thence over Pennsylvania Highway 18 to New Castle, Pennsylvania."

"From Wheeling over U. S. Highway 40 to Uniontown, Pennsylvania"

"From Pittsburgh over U. S. Highway 19 to Washington, Pennsylvania"

"All intermediate points on the above specified routes."

It is these routes which Respondent in its brief and the Superior Court of Pennsylvania in its decision represent transportation is limited with no right of interchange between the routes and no right to combine the routes in actual operation.

The record definitely shows that in connection with other interstate operations begun prior to June 1, 1935, into Ohio and West Virginia via Wheeling, West Virginia, and between Pittsburgh and Washington, Pennsylvania, via Wheeling, West Virginia, and between Pittsburgh and Uniontown, Pennsylvania, via Wheeling, West Virginia (Record, pages 254a, 291a, 294a, 295a), the Petitioners applied for a certificate under the "grandfather" clause of the Federal Motor Carrier Act to continue its interstate operations. The order of the Interstate Commerce Commission was issued in response to such application (Record, page 373a).

The Federal Motor Carrier Act, 49 U. S. C. A. 301, prescribes no limitation upon the right to interchange between or combine routes. Actually, Section 216 (c) of said act provides that common carriers of property by motor vehicle may establish reasonable through routes.

For that reason it has become the invariable practice of the Interstate Commerce Commission, in the absence of specific restrictions, to describe the regular routes in compliance orders and certificates in any manner which is most convenient with the intention that the entire operation is one unified system and the carrier may operate over the different portions thereof in any manner to suit his convenience and that of the public.

This practice and the recognition that an order authorizing operations over two or more routes which have one or more points in common authorizes operations over all combinations of such routes and between all points thereon over the routes specifically described in the order, have become so well accepted and so seldom contested that there are few reported opinions of the Interstate Commerce Commission thereto.

Petitioners in their original Brief, pages 12-13, cited *Dixie Freight Lines, Inc., Common Carrier Application*, 24 M. C. C. 780, 783:

> "To comply with interveners' request would be contrary to our general policy relative to extension applications, wherein we customarily describe only the proposed route as extended, and if such route is authorized the motor carrier has a right to transport interstate commerce over it to or from any point on its existing routes. This policy avoids duplication of authority."

That case is quite pertinent to the question here involved. Under a "grandfather" clause application the Commission found applicant to be a bona fide operation in interstate commerce between Montgomery, Alabama and Fort Benning, Georgia, via Opelika, Alabama and Columbus, Georgia, over Route 4. Under a finding of public convenience and necessity authority was granted to operate between Montgomery, Alabama, and Atlanta, Georgia, via Opelika, Alabama, over Route 3. Based upon such authorization the applicant published a tariff and transported property between Atlanta, Georgia and Columbus and Fort Benning, Georgia, via Opelika, Alabama. The Georgia Public Service Commission filed a petition for reconsideration, clarification and modification of the order. Upon oral argument before the Interstate Commerce Commission counsel for the Georgia Public Service Commission stated

that motor carriers had authority, from his Commission, to transport commodities between Atlanta and Fort Benning over a route within Georgia twenty-eight miles less than the contested interstate route via Opelika. He further contended that applicant's use of this route was a subterfuge to evade the intrastate regulations. *It was contended that the facts therein are somewhat similar to those in Eichholz v. Missouri Public Service Commission*, 306 U. S. 268 (1939).

In commenting upon this reference to the *Eichholz Case* the Interstate Commerce Commission, at pages 782-783, said:

> "In our opinion the facts in that case are not similar to those in the instant case. There can be no question but that property transported from Atlanta to Fort Benning via Opelika moves in interstate commerce. This is seen from the definition of that term in section 203 (a) (10) of the Motor Carrier Act, 1935, which reads as follows:
>
> 'The term "interstate commerce" means commerce between any place in a State and any place in another State or between places in the same State through another State, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water.
>
> 'If we assume, for sake of argument, that applicant had not purchased the rights of R. E. Lewis, doing business as Lewis Transfer Company, embraced in No. MC-4378, that a certificate under the "grandfather" clause had been issued to Lewis to continue operation over route 3, and that applicant had been authorized under a finding of public convenience and necessity to continue the operation over route 4, under section 216 (c) of the Motor Carrier Act, 1935, appli-

cant and Lewis would have the right to establish reasonable through routes and joint rates applicable to property transported by applicant from Atlanta to Opelika and there interchanged with Lewis for Fort Benning delivery. We therefore fail to see the logic or reasonableness of the contention which would result in denying to applicant, the present owner of the rights of Lewis, the right to transport, without interchange at Opelika, property between Atlanta and Fort Benning over this interstate route. Moreover, in our opinion, the record contains no valid reason that would cause us thus to restrict the authority to be granted to applicant and to deprive the shipping public of applicant's transportation facilities between these Georgia points.' "

In the present case petitioners were operating between points in Pennsylvania via Wheeling, West Virginia under a similar order of the Interstate Commerce Commission, issued September 5, 1939 finding petitioners were on June 1, 1935, and continuously since, in bona fide operation as a common carrier by motor vehicle in interstate or foreign commerce over such routes,—similarly to the situation above described (Record, page 373a). It was not until September 4, 1940, that the Pennsylvania Public Utility Commission sought to assume jurisdiction over petitioners by ordering them to cease and desist operating over the routes and between points authorized by the order of the Interstate Commerce Commission.

In other cases the Interstate Commerce Commission has recognized the right of interchange between routes described similarly to those in this order issued to Petitioners.

In *Keeshin Motor Exp. Co., Inc.*, (Illinois)—Leases, 1 M. C. C. 373, (1936), an early case involving unification of common-carrier general commodity operations, Division

5, of the Interstate Commerce Commission, stated at pages 380 and 381:

> "In their exceptions counsel for protestants further argue that the approval of this application would permit the extension of routes and the establishment of new routes without any regard to the public convenience and necessity for such new operations. This raises the question whether acquisition by one carrier of the operating rights of another gives such purchaser or lessee authority to render a through or unified service. The contention of protestants apparently is that, in addition to procuring approval of an application to acquire properties and operating rights, applicant should also procure, upon proof of public convenience and necessity, specific authority for such through or unified service. We cannot subscribe to an interpretation which would require such authority in addition to that which results from those operating rights which motor common carriers individually preserve or obtain as result of applications for certificates of public convenience and necessity. The right of motor common carriers to establish through routes over which through service is conducted is recognized by Section 216 of the Motor Carrier Act, 1935. It would be inconsistent to hold that such through service may not be rendered, without special proof of public convenience and necessity, after any such carriers are merged or otherwise unified."

The same conclusion was also reached by the Interstate Commerce Commission, even though the applicant had previously interchanged no traffic with the vendor in *Lee Way Motor Freight Inc.,—Merger*, 25 M. C. C. 520 (1939) where it was said at page 523 by the Commission:

> "DeShong and the surviving corporation have not interchanged traffic at Childress. Protestants con-

tend, therefore, that inasmuch as the proposed unification contemplates, among other things, institution of a new through service between Fort Worth and Dallas, on the one hand and Texas Panhandle points, on the other, via Childress gateway, the application should be disapproved in the absence of proof that the public convenience and necessity require such through service. With such contention we cannot agree, for in our opinion, where as here, a physical connection of routes exists, through service may be provided by unification of the operations theretofore in separate ownership, provided that we find the transaction to be consistent with the public interest."

In the application of *Andrew Clark—Lease—Clifford W. and Noel Ronken*, 36 M. C. C. 195 (1940) page 201, the Interstate Commerce Commission, through Division 4, found:

"We have heretofore found in unification cases that, where a physical connection of routes exist (which in the instant case, is at any point within southern Minnesota which applicant is at present authorized to serve), the acquiring carrier after such unification may render through service between all points authorized to be served on the connecting routes of both, provided it is found that the transaction considered as a whole, is consistent with the public interest."

See also the case of *Wilson Storage and Transfer Company—Purchase—Flamming Motor Express, Incorporated*, 35 M. C. C. 231 where the Commission found the purchase to be consistent with public interest and explained the method in which the routes could be operated. Said the Commission at page 235:

"Hence, so far as the rendering of through service between points on Transportation's Lake Benton-Man-

kato route, except Mankato, on the one hand, and points on applicant's St. Paul-Sioux Falls route, on the other, is concerned, the situation is not distinguishable from numerous cases where it has been found that, *upon transfer of existing rights to new ownership as a result of a section 213 proceeding, the acquiring carrier may render through service between all points on the physically connecting routes of both.* English—Purchase—Robison, 5 M. C. C. 221; Transamerican Freight Lines, Inc.—Purchase—Gormain, 5 M. C. C. 712; Gateway City Transfer Co., Inc.—Purchase—Minert, 15 M. C. C. 749, 751; and Lee Way Motor Freight, Inc.—Merger, 25 M. C. C. 520." (Italics supplied)

To adopt the interpretation of the Superior Court of Pennsylvania, the Public Utility Commission of Pennsylvania and its Brief herein filed, contrary to the above interpretations by the Interstate Commerce Commission, would throw into absolute confusion the thousands of orders, issued in form similar to that issued Petitioners, and demoralize the administration built up under the operation of the Federal Motor Carrier Act.

The Brief of Respondent rests upon this erroneous interpretation:

1. To bring the present case within the *Eichholz Case;*

2. To deny that the Interstate Commerce Commission had taken jurisdiction and granted authority over the routes in question;

3. To sustain the authority for order of the Pennsylvania Commission and the opinion of the Superior Court of Pennsylvania, upholding such order.

The present case is distinguishable from *Eichholz v. Public Service Commission of Missouri, supra,* in the following controlling essentials:

Argument

1. The State Laws

a. The Missouri Bus and Truck Act (laws of 1931 C. P. 307, 308), Section 5268 (b) declared it to be unlawful for any motor carrier (with certain immaterial exceptions) to use any of the public highways of the state in interstate commerce without first having obtained a permit from the Commission. Issuance of such permit required consideration of the kind and character of vehicles permitted over the highway and the filing of liability insurance or bond. The statute also authorizes the State Commission to prescribe regulations governing motor carriers.

b. The Pennsylvania regulatory laws provide no authority over interstate commerce through the issuance of any authority to regulate the use of its highways or otherwise. Section 1402 of the Pennsylvania Public Utility Law (66 P. S. § 1532) specifically provides:

> "Interstate and Foreign Commerce. The provisions of this act, except when specifically so provided shall not apply, or be construed to apply, to commerce with foreign nations, or among the several states, except in so far as the same may be permitted under the provisions of the Constitution of the United States and the acts of Congress."

The order of the Commission (Record page 448a), the opinion of the Superior Court (Record, page 476a), and the brief of respondent claim no such authority over interstate commerce.

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2. Violation of Orders of State Commission

a. Eichholz violated orders of the Missouri Commission; (1) the permit of that Commission specifically limited him to operate as a freight carrying motor carrier over an irregular route between points in Missouri and points

beyond that State, "exclusively in interstate commerce", by operating between points in the State of Missouri; (2) the regulation of the State Commission governing such permits and prohibiting accepting for transportation property between points within the State; and (3) the order of the Missouri Commission establishing intrastate freight rates.

b. Petitioners have violated no order of the Pennsylvania Commission. As to (1) and (2) above, Pennsylvania was without authority. There was no order establishing freight rates intrastate in Pennsylvania to be violated. In obedience to the compliance order of Interstate Commerce Commission, of September 5, 1939, petitioners filed tariffs for transportation over the routes in question with the Interstate Commerce Commission.

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3. SUBTERFUGE

a. Eichholz under the facts as found by the District Court and recited in the opinion of your Honorable Court, did not in many instances unload merchandise at the terminal outside the State (Kansas City, Kansas) and only in a negligible percentage of the shipments between Missouri points were the goods unloaded at this out-of-State depot.

b. Petitioners, as shown by the record, in all instances unshipped the goods from the inbound truck to its platform at its Wheeling, West Virginia, terminal and reloaded them into outbound trucks for distribution over the various routes radiating from Wheeling into Ohio, West Virginia and Pennsylvania (Record, page 293a). It also appears that such operation through Wheeling, West Virginia, was the only manner in which petitioners could operate to handle the traffic moving between the three states and between the

points in Pennsylvania (Record, pages 262a, 266a, 300a-301a, 405a-406a).

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4. State Action Related to Federal Action

a. In the *Eichholz Case* (p. 273) when the State Commission revoked its permit the Interstate Commerce Commission had not acted upon appellant's application under the Federal Motor Carrier Act.

b. In the present case the Interstate Commerce Commission had acted upon petitioner's application under the Federal Motor Carrier Act through issuing to petitioners the compliance order on September 5, 1939 (Record, page 373a). The Pennsylvania Commission did not issue its order, requiring petitioners to cease and desist from operating over the routes in question and authorized by the above compliance order, until September 4, 1940 (Record, page 474a).

It is therefore clear that the *Eichholz Case, supra,* does not apply under the differing facts of the present case, and that the Superior Court of Pennsylvania erred in its reliance thereon.

Petitioners legitimately crossed the Pennsylvania line to establish interstate operations between Wheeling, West Virginia, and the Uniontown section of Pennsylvania in 1921. In May, 1934, the operations out of and through Wheeling, West Virginia, were extended over routes into Ohio, West Virginia and the Pittsburgh territory in Pennsylvania (Record, page 291a). Via Wheeling, West Virginia, these routes were conducted as one operation to permit the transportation of goods between Ohio and Pennsylvania and West Virginia; between West Virginia and Ohio and Pennsylvania points; as well as traffic between Pennsylvania points, necessary to the support of the traffic

between the different states (Record, pages 263a, 271a, 295a, 297a, 302a, 303a).

It was for the continuing operation of this combination of routings via Wheeling, West Virginia, that application was duly filed by petitioners under the authority and requirement of the Federal Motor Carrier Act. The Interstate Commerce Commission acting upon this application through its order of September 5, 1939, found that petitioners were on June 1, 1935 (the "grandfather" date), and continuously since, in bona fide operation as a common carrier by motor vehicle in interstate or foreign commerce over this combination of routes, including those here questioned.

Wherefore, petitioners pray that your Honorable Court will issue a writ of certiorari to review the final decision of the Superior Court of Pennsylvania.

Respectfully submitted,

HAROLD S. SHERTZ,
PAUL F. BARNES,
814 Crozer Building,
Philadelphia, Pa.,
ROBBIN B. WOLF,
W. DAVIS GRAHAM,
801 Plaza Building,
Pittsburgh, Pa.,
Attorneys for Petitioners